2000

Paul Blackner v. State of Utah, Department of Transportation and the Utah Department of Transportation and City of Alta : Brief of Appellee

Utah Supreme Court

Case No. 20000906-SC

IN THE UTAH SUPREME COURT

PAUL BLACKNER,

Plaintiff/Appellant,

v.

THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, and the UTAH DEPARTMENT OF TRANSPORTATION and CITY OF ALTA,

Defendants/Appellees

Priority No. 15

BRIEF OF DEFENDANT - APPELLEE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION and UTAH DEPARTMENT OF TRANSPORTATION

Appeal from a Third Judicial District Court, the Honorable William B. Bohling

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LIST OF ALL PARTIES

To the best of Defendant State of Utah, Department of Transportation's knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF DEFENDANT - APPELLEE THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION and UTAH DEPARTMENT OF TRANSPORTATION

STATEMENT OF JURISDICTION

This matter comes within the original jurisdiction of the Supreme Court of the State of Utah under Utah Code Ann. § 78-2-2(3)(j) (1996).

STATEMENT OF THE ISSUES

1. Plaintiff's alleged injuries arose out of, and were the results of, avalanches that were caused by natural conditions on publicly owned lands. For this reason, the trial court correctly held that the defendants were entitled to immunity under Utah Code Ann. § 63-30-10(11) (1996).

This issue was raised by the defendants in their motions for summary judgment (R. 158-61, 180) and the trial court granted these motions, in part, based upon this issue (R. 281).

STANDARD OF REVIEW: The trial court granted the defendants' motions for summary judgment for this reason, as well as on the grounds raised by the plaintiff in his opening brief. R. 281. This Court can consider such matters even though raised for the first time by the appellees. Brown v. Glover, 2000 UT 89, ¶24, 16 P.3d 540; Buehner Block Co. v. UWC Assoc., 752 P.2d 892, 894-95 (Utah 1988); State v. South, 924 P.2d 354, 355 n.3 (Utah 1996).

2. Plaintiff's alleged injuries arose out of and were the results of the efforts to control and manage avalanches, which constitute a natural disaster. For this reason, the trial court correctly held that the defendants were entitled to immunity under Utah Code Ann. § 63-30-10(13) (1996).

This issue was raised by the defendants in their motions for summary judgment (R. 158-61, 180-81) and the trial court granted these motions, in part, based upon this issue (R. 281).

STANDARD OF REVIEW: This issue was decided below upon the defendants' motions for summary judgment. Reviewing the trial court's grant of a motion for summary judgment "includes a determination of whether the trial court correctly applied governing law, affording no deference to the trial court's determination or conclusions of law." Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc., 2000 UT 18, ¶4, 994 P.2d 1261; Gardner v. Perry City, 2000 UT App 1, ¶6, 994 P.2d 811. "In matters of pure statutory interpretation, an appellate court reviews a trial court's ruling for correctness and

gives no deference to its legal conclusions." Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997).

DETERMINATIVE STATUTES

Utah Code Ann. § 53-2-102 **Definitions.** (1993)

. . .

(2) "Disaster" means a situation causing, or threatening to cause, widespread damage, social disruption, or injury or loss of life or property resulting from attack, internal disturbance, natural phenomena, or technological hazard.

. . .

(8) "Natural phenomena" means any earthquake, tornado, storm, flood, landslide, avalanche, forest or range fire, drought, or epidemic.

Utah Code Ann. § 63-30-10 **Waiver of immunity for injury caused by negligent act or omission of employee - Exceptions.** (1996)

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from:

. . .

(11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire and State Lands;

. . .

(13) the management of flood waters, earthquakes, or natural disasters;

STATEMENT OF THE CASE

Paul Blackner filed this action originally against the State of Utah, Department of Transportation and the Utah Department of Transportation (UDOT).[1] R. 1-6. Plaintiff

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[1] While listing the State of Utah's Department of Transportation in the caption of both the original complaint and the amended complaint as if it were two entities, the plaintiff has consistently, both on appeal and in the trial court, treated this doubly named

was later permitted to amend his complaint so as to add the Town of Alta as a defendant to this action. R. 137-41. Blackner alleged that he had been seriously injured as the result of an avalanche. Plaintiff claimed that his injuries resulted from the negligence of UDOT and Alta employees in their treatment of a prior avalanche and the danger of further avalanches in the canyon that day. Id.

Both UDOT and the Town of Alta filed motions for summary judgment. R. 152-67, 175-94. Both motions for summary judgment were based on the retention of governmental immunity for injuries arising out of, in connection with, or resulting from any natural condition on publicly owned land and for the management of natural disasters. Utah Code. Ann. § 63-30-10 (11) & (13) (1996).[2]

After oral argument (R. 294), the trial court entered its order granting summary judgment for the defendants on the grounds that they were entitled to immunity on both of the above-raised grounds on October 16, 2000. R. 280-82. The plaintiff filed his notice of appeal on October 23, 2000. R. 286-87.

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defendant as if it were a single defendant and entity. R. 1-6, 137-41.

[2] UDOT's motion was also based on the retention of immunity for activities relating to emergency evacuations. Utah Code Ann. § 63-30-10 (18) (1996). The trial court did not grant summary judgment based on this provision of the statute and this issue is not before the Court on appeal.

STATEMENT OF RELEVANT FACTS

The following numbered facts are taken from the Town of Alta's motion for summary judgment. The plaintiff expressly accepted these facts to be true for the purpose of both defendants' motions for summary judgment. R. 229.

1. On March 14, 1998, an avalanche occurred in Little Cottonwood Canyon, near Alta, Utah, in an area known as the White Pine Chutes, which is situated north (across the canyon road) from Tanner's Flat Campground and White Pine Fork.
2. The avalanche partially covered the canyon road and blocked vehicles traveling in the downhill lane.
3. The avalanche was first spotted by Snowbird personnel atop Hidden Peak, who then reported the occurrence to Alta's Central Dispatch Office. In turn, Kevin Payne, a Deputy Marshal for the Town of Alta, was notified of the avalanche and arrived at the scene approximately three minutes later.
4. Upon arrival at the scene, Deputy Payne became concerned that vehicles in both the uphill and downhill lanes would attempt to drive around the obstacle and collide head on. Therefore, he began to control traffic around the avalanche debris by directing each lane of traffic to take turns using the open lane.
5. In order to remove the debris from the road, a front-end loader was dispatched from the Snowbird Ski Area and arrived approximately 15 minutes later. When the front-end loader arrived, it began to push avalanche debris off the side of the road. While the loader was working, traffic could not safely negotiate around both the loader and the debris. Therefore, vehicles in both lanes of travel were stopped to allow the loader to clear the road.
6. Approximately five to ten minutes after the loader began to clear the debris, Deputy Payne received a radio call from Mr. Dave Madera, UDOT's avalanche forecaster on duty that day. Mr. Madera explained that he was in one of the vehicles waiting in the uphill lane and he had begun to worry about the safety of his location and asked how much longer the loader would be working. Deputy Payne advised Mr. Madera that the loader was taking its last scoop. Several seconds later, another avalanche tumbled onto the road and struck some of the vehicles stopped in the uphill lane, including plaintiff's vehicle and Mr. Madera's vehicle, pushing several

vehicles off the road and into the east end of the Tanner's Flat Campground.
7. Plaintiff was injured as a result of the second avalanche.
The area north of the canyon road, including the While Pine Chutes where both avalanches originated, is public land designated as the Twins Peaks Wilderness Area, which is managed by the National Forest Service as part of the Wasatch-Cache National Forest.

R. 177-79 (citations to exhibits in the record have been omitted).

Paul Blackner alleged in his Amended Complaint that he was stopped because UDOT and Town of Alta employees were "engaged in moving, controlling, and directing those who became trapped in the avalanche, or were on the road in the canyon." R. 138. Plaintiff further admitted in his amended complaint that previous avalanches at this location had caused fatalities. R. 139. The first avalanche had blocked half of the road. R. 165. There had been other avalanches in the canyon that day, but the others had not reached the roadway. Id. The two avalanches relevant to this action were the result of natural causes and not of any avalanche control efforts. R. 166. Many people, including the plaintiff and a UDOT employee, were caught in the second avalanche. Id. These avalanches were natural disasters that could not have been predicted. Id.

SUMMARY OF ARGUMENT

Plaintiff was injured by an avalanche. The avalanche was caused by the slippage of naturally occurring snow that was on publicly owned land. At the time of the incident, the plaintiff was waiting on a public state road for the debris left from a previous avalanche to be cleared away so that the road could be reopened. His injuries arose out of, in connection with, or resulted from a natural condition on publicly owned land. In

the same manner, his injuries were related to efforts by two government entities to manage a natural disaster (both avalanches). For these reasons the trial court correctly found that the defendants were entitled to immunity and dismissed this action. UDOT urges this Court to affirm the trial court's decision.

ARGUMENT

I. PLAINTIFF'S INJURIES AROSE OUT OF, IN CONNECTION WITH OR RESULTED FROM A NATURAL CONDITION ON PUBLIC LAND

In the lower court, the plaintiff stipulated that he was injured by an avalanche created and caused by the condition of the snow on land owned and operated by the U.S. Forest Service. The undisputed fact is that the avalanche was caused naturally and was not the product of any human intervention. The trial court correctly ruled that these facts showed that the plaintiff's injuries arose out of, in connection with or resulted from a natural condition on public land.

As was the case in Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1164 (Utah 1993), the issue of whether the plaintiff could state a valid tort cause of action was not addressed by the defendants' motions for summary judgment. Instead, the sole issue raised was whether immunity had been retained under several provisions of the Governmental Immunity Act. Plaintiff's opening brief conflates the unrelated issues of whether immunity has been retained and whether a duty was owed by these defendants to

the plaintiff and was breached. This Court has clearly stated that these are distinct issues and should not so intermingled. Ledfors, 849 P.2d at 1163-64.

Further, in interpreting the Governmental Immunity Act, this Court has stated that it should be strictly applied so as to preserve sovereign immunity. Taylor v. Ogden Sch. Dist., 927 P.2d 159, 162 (Utah 1996).

A. Plaintiff's opening brief misrepresents that this issue was not addressed below.

In his opening brief, the plaintiff misrepresents to this Court the grounds upon which the trial court made its decision to grant the defendants' motions for summary judgment. Plaintiff mistakenly claims that the trial court "confined its ruling to the question of whether the Appellees were involved in the 'management of a natural disaster' while clearing the snow from avalanche No. 1" and that this was "the singular basis for the lower court's ruling as established by the record below." Brief of Appellant at 8 and 10.

Even a quick reading of the trial court's order of dismissal (entitled "Summary Judgment") demonstrates that it was based both on immunity for injuries arising from the management of a natural disaster (Utah Code Ann. § 63-30-10 (13) (1996)) and on immunity for injuries arising from a natural condition upon publicly owned land (Utah Code Ann. § 63-30-10(11) (1996)). R. 281. The lower court's decision expressly states "[t]hat the defendants respective motions for summary judgments are granted pursuant to U.C.A. § 63-30-10(11) and (13)." R. 281, a copy of which is attached hereto as

Addendum A. Plaintiff has failed to address in his opening brief one of the two grounds upon which the trial court based its decision to dismiss this action. Nor does the citation to the oral argument transcript, relied upon by the plaintiff in his mistaken claim that the trial court did not dismiss this action upon the grounds of immunity arising out of a natural condition on publicly owned land, support his representations.

> THE COURT: Thank you.
> The Court is going to grant the motion for summary judgment for both Department of Transportation and the City of Alta. It's the Court's view in examining the applicable statute that though there's certainly some basis for discussion – and I think Plaintiff has done an excellent job of raising the other way of examining this, it's the Court's view that the intention as communicated by the legislature in this statute is that – that the avalanche is a natural phenomenon, it is certainly a natural condition of the land and that the – a disaster is a situation that causes widespread damage to property that results from natural phenomenon. And in the Court's view this sort of condition would follow in the description of "widespread damage" and would therefore be within the statute and would allow the immunity to the entities that are sued here as the Defendants.

R. 294, page 16 (emphasis added).

B. Plaintiff's injuries were caused by a natural condition on public land.

This Court has applied a three step approach to determining whether or not immunity is applicable to a specific case. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1164 (Utah 1993). The first step is to determine whether the activity performed by the entity is a governmental function. The Utah Governmental Immunity Act grants immunity to governmental entities in their exercise of governmental functions. Utah Code Ann. § 63-30-3 (1991). In the instant action, plaintiff has not disputed on appeal

that the maintenance of a public road is a governmental function. Indeed, this Court has stated that traditionally, such activity has always been considered governmental. McCorvey v. Utah State Dep't of Transp., 868 P.2d 41, 47 (Utah 1993). Further, the Immunity Act expressly states that all actions of government (or failures to act) are to be considered governmental functions. Utah Code Ann. § 63-30-2(4)(a) (1994).

The second step requires a determination of whether there is a waiver of immunity. If such a waiver exists, the third step involves a determination regarding any exceptions to the waiver.

The plaintiff claims that the waiver of immunity found in Utah Code Ann. § 63-30-10 (1996) is applicable. This statute waives immunity for injuries proximately caused by the negligence of government employees, unless the injury "arises out of, in connection with, or results from" one of a list of retentions of immunity. One such retention in subsection 10 is for injuries arising out of, connected with, or resulting from any natural condition on publicly owned land.

This Court has repeatedly held that the statutory retention of immunity applies regardless of the particular type of negligence that the plaintiff may claim, or how the plaintiff may style his claims. The important question is not the type of negligence alleged, but rather whether the injuries arose out, are connected with or result from a natural condition on publicly owned land. In Ledfors, this Court explained:

> Again, our prior cases have looked to whether the injury asserted "arose out of" conduct or a situation specifically described in one of the subparts of

> 63-30-10; if it did, then immunity is preserved. We have rejected claims that have reflected attempts to evade these statutory categories by recharacterizing the supposed cause of the injury . . . .
> In sum, the Ledforses ignore the fact that the structure of the Utah Governmental Immunity Act, especially section 63-30-10, focuses on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged. Because Richie's injuries arose out of a battery, we cannot ignore the plain meaning and fair import of section 63-30-10 of the Act.

Id. at 1166-67 (citing Sheffield v. Turner, 21 Utah 2d 314, 316, 445 P.2d 367, 368 (1968)). See also Maddocks v. Salt Lake City Corp., 740 P.2d 1337, 1340 (Utah 1987) (rejecting argument that assault and battery exception did not apply to claim that two police officers negligently failed to intervene to prevent beating of plaintiff by another officer).

This Court reached the same conclusion in Malcolm v. State, 878 P.2d 1144, 1146-47 (Utah 1994); S.H. v. State, 865 P.2d 1363, 1364-65 (Utah 1993); Petersen v. Bd. of Educ., 855 P.2d 241, 242-43 (Utah 1993); and Higgins v. Salt Lake County, 855 P.2d 231, 240-41 (Utah 1993). In each of these decisions, this Court reiterated that the question of whether the retention of immunities under section 10 are applicable is determined not by considering the type of negligence alleged, but rather looking to whether or not the complained-of injuries arose out of one of the listed situations or conducts found in section 10.

Finally, in Taylor, this Court expressly defined what was meant by the statutory phrase "arose out of."

> Taylor maintains that the assault exception should not apply because Zachary's injuries have a greater link to the dangerous window in the restroom than to Trenton's assault. However, "arises out of" within the assault exception "'is a phrase of much broader significance than "caused by."'" Under the phrase's ordinary meaning, the assault need not be the sole cause of the injury to except the governmental entity from liability for the injury. The language demands "'only that there be *some* causal relationship between the injury and the risk'" provided for.

Taylor, 927 P.2d at 163 (citations omitted).

It cannot be disputed that the avalanche that caused the plaintiff's injuries arose out of the natural conditions upon public lands. Even if this were not so, the statute gives three alternative relationships between the injury and the retentions of immunity of which "arises out of" is only one, "connection with" and "results from" being the others. "Connection" is defined as "3. anything that connects; connecting part; link; bond." Webster's Encyclopedic Unabridged Dictionary of the English Language 432 (1996). "Result" is defined as "1. to spring, arise, or proceed as a consequence of actions, circumstances, premises, etc.; be the outcome." Webster at 1642.

The avalanche which caused his injuries was clearly "connected with" the natural condition upon land owned by the public. The avalanche was caused by the natural condition of the land and the naturally occurring snowpack thereon. The cause and effect connection between the plaintiff's injuries and this natural condition on publicly owned land cannot be disputed. This is more than sufficient to demonstrate a connecting link or bond between the natural condition of the publicly owned land and the plaintiff's injuries.

Further, the plaintiff's injuries clearly "resulted from" the natural conditions upon land owned by the public. Again, it cannot be argued but that the injuries in question resulted from the natural condition on the publicly owned land. The claimed injuries were the consequence, the outcome, of the natural conditions on the publicly owned land. Interpreting broadly these two phrases, as this Court explained "arises out of" must be interpreted in Taylor, makes it clear that the trial court correctly determined that the governmental immunity of UDOT had been retained and this action was correctly dismissed.

This is not an action like Nelson by and through Stuckman v. Salt Lake City, 919 P.2d 568 (Utah 1996), in which the government entity had sought to protect against a natural condition by building a fence.[3] The undisputed fact is that the avalanche could not be predicted. The retention of immunity for natural conditions was intended for just such conditions that will cause damage and injuries without a real ability on the part of the government actor to protect the public user of public lands.

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[3] It must also be noted that Nelson only considered the phrase "arises out of" and not the other two statutory alternative phrases. Each phrase must be given "a relevant and independent meaning so as to give effect to all of [the statute's] terms." V-1 Oil Co. State Tax Comm'n, 942 P.2d 906, 917 (Utah 1997).

II. PLAINTIFF'S INJURIES AROSE OUT OF, IN CONNECTION WITH OR RESULTED FROM THE MANAGEMENT OF A NATURAL DISASTER

The trial court found that avalanches constituted a "natural disaster" under the Governmental Immunity Act such that injuries arising out of, in connection with or resulting from efforts to manage them were entitled to the retention of governmental immunity. In interpreting statutory language, this Court has explained:

> First, our primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve. We need look beyond the plain language only if we find some ambiguity. "In analyzing a statute's plain language, we must attempt to give each part of the provision a relevant and independent meaning so as to give effect to all of its terms." However, if we find a provision that causes doubt or uncertainty in its application, we must "analyze the act in its entirety and 'harmonize its provisions in accordance with the legislative intent and purpose.'" Nevertheless, a statute's unambiguous language "may not be interpreted to contradict its plain meaning."

State v. Burns, 2000 UT 56, ¶ 25, 4 P.3d 795 (citations omitted).

As already noted, this Court has stated that the legislative intent with regard to the Governmental Immunity Act was that it be "strictly applied to preserve sovereign immunity." Taylor, 927 P.2d at 162. The plaintiff's injuries arose out of, in connection with, or resulted from the two avalanches in question. They arose out of the efforts by the defendants to manage those avalanches. While the efforts of the defendants failed, in this case, to protect the plaintiff and other members of the public, that does not change the

fact as to from what circumstances the plaintiff's injuries sprang. Plaintiff claims the trial court erred in finding that the avalanches in question were natural disasters.

UDOT submits that the plain meaning of natural disaster would be any naturally occurring event that has the potential to cause damage or loss. Natural is defined as "1. existing in or formed by nature, 2. based on the state of things in nature; constituted by nature." Webster's Encyclopedic Unabridged Dictionary of the English Language 1280 (1996). A disaster is defined as "a calamitous event, esp. one occurring suddenly and causing great loss of life, damage, or hardship, as a flood, airplane crash, or business failure." Webster's at 561. The avalanches in question meet the normal usage of the phrase "natural disaster." The plaintiff's amended complaint clearly alleges that the avalanche zone in question has resulted in fatalities. R. 139. The avalanche that injured plaintiff also caused significant other damage as well. For this reason, the trial court correctly determined that avalanches are included in the statutory term "natural disaster."

Plaintiff, without explanation, seeks to import into the Governmental Immunity Act the definition of "disaster" found in Utah's Comprehensive Emergency Management Act, Utah Code Ann. § 53-2-102(2) and (8) (1993). Even if this definition is applied, the avalanches in question clearly meet the statutory test for what would be a natural disaster.

> (2) "Disaster" means a situation causing, or threatening to cause, widespread damage, social disruption, or injury or loss of life or property resulting from attack, internal disturbance, natural phenomena, or technological hazard.
> (8) "Natural phenomena" means any earthquake, tornado, storm, flood, landslide, avalanche, forest or range fire, drought, or epidemic.

While situations caused by attack, internal disturbance or technological hazard would clearly not meet the test for being a "natural disaster," those caused by "natural phenomena" would appear to do so. It is interesting that the legislature thought that avalanches were among those "natural phenomena" that it considered to be capable of creating a "disaster." This fact supports the trial court's conclusion that the phrase "natural disaster" in the Immunity Act should be read to also include avalanches.

Plaintiff mistakenly claims that the challenged avalanches would not meet the definition of "disaster" found in this statute. This is based upon a faulty reading of the provisions of the statute. In order to meet the definition of a "disaster," a situation must: 1) cause or threaten to cause either widespread damage, social disruption, injury, loss of life, or loss of property and 2) result from an attack, internal disturbance, natural phenomena, or technological hazard. Given the statutory definition of "natural phenomena," all avalanches will always meet this second element of the definition of a "disaster."

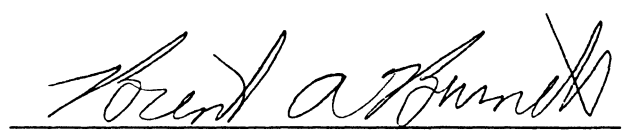
Both of the avalanches in question also met the first element of the definition. While the first avalanche only threatened to cause injury, loss of life or of property, the second avalanche actually caused injury and loss of property. The plaintiff's claimed injuries either "arose out of" the attempts to manage these avalanches, "were connected with" such management efforts, or "resulted from" such efforts. For this reason the trial

court was correct when it determined that the retention of immunity for management of natural disasters was applicable to the plaintiff's claims.

CONCLUSION

For the reasons presented above, the trial court's decision, dismissing this action with prejudice, should be affirmed.

DATED this 20th day of March, 2001.



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CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing BRIEF OF DEFENDANT - APPELLEE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION and UTAH DEPARTMENT OF TRANSPORTATION to the following this 20th day of March, 2001:

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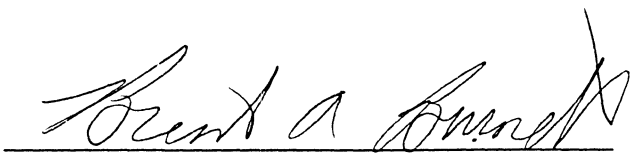

ADDENDUM A

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PAUL BLACKNER, Plaintiff, v. THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, and the UTAH DEPARTMENT OF TRANSPORTATION and CITY OF ALTA, Defendants.	**SUMMARY JUDGMENT** Civil No. 990906368 Judge William B. Bohling

On Monday, August 28, 2000, the defendants' respective Motions for Summary Judgment were argued to the Court. The plaintiff appeared in person and was represented by Tad D. Draper, Esq. The defendant State of Utah, Department of Transportation was represented by Sandra L. Steinvoort, Assistant Attorney General, and the defendant City of Alta was represented by David C. Richards, Esq. The Court having reviewed memoranda filed, having heard the

argument of counsel, the court having accepted the facts submitted in the memoranda of the respective defendants as the plaintiff did not dispute them, and for good cause appearing, now and therefore, orders, adjudges and decrees as follows:

1. That the defendants respective motions for summary judgments are granted pursuant to U.C.A § 63-30-10(11) and (13).

DATED this 16 day of ~~September~~ October, 2000.

BY THE COURT

Judge William B. Bohling
District Court Judge

APPROVED AS TO FORM ~~AND CONTENT~~

Tad Draper, Esq.

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